In the Matter of Kambui Hannibal,
Atlantic City Housing Authority
DOP Docket No. 2004-2191
(Merit System Board, decided March 8, 2006)

The appeal of Kambui Hannibal, a Maintenance Repairer with the Atlantic City Housing Authority, of his removal, effective December 19, 2003, on charges, was heard by Administrative Law Judge Joseph F. Martone (ALJ), who rendered his initial decision on February 2, 2006. Exceptions were filed on behalf of the appointing authority.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on March 8, 2006, accepted and adopted the Findings of Fact as contained in the attached initial decision, but did not adopt the recommendation to modify the appellant's removal to a six-month suspension.[1] Rather, the Board upheld the removal.

DISCUSSION

On July 31, 2003, the appellant was issued a Preliminary Notice of Disciplinary Action, suspending him immediately with pay on charges of conduct unbecoming a public employee and other sufficient cause: cursing, yelling and pushing a tenant and cursing and yelling at other tenants and security guards. Specifically, the appointing authority asserted that on July 10, 2003, the appellant yelled at tenants and security guards in a rude manner with profanity and placed his hands on and pushed a disabled tenant. On December 19, 2003, a Final Notice of Disciplinary Action (FNDA) was issued against the appellant, upholding the charges and removing him from employment, effective December 19, 2003. The FNDA also indicated that the appellant was suspended with pay from August 1, 2003 through October 31, 2003 and suspended without pay from November 1, 2003 through December 18, 2003. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

In the initial decision, the ALJ sets forth the testimony of the witnesses and a summary of the documentary evidence. Howard Archer, a tenant in the building where the incident occurred, testified that he returned to his apartment building on

[1] It is noted that the Final Notice of Disciplinary Action indicates that the appellant was suspended with pay for 66 days from August 1, 2003 through October 31, 2003, suspended without pay for 34 days from November 1, 2003 through December 18, 2003, and removed effective December 19, 2003. The matter was transmitted to the Office of Administrative Law as two suspensions and a removal. However, the suspensions and removal pertain to the same underlying incident. Therefore, the Board is treating the discipline as one penalty of removal, as did the ALJ.

the evening of July 10, 2003 and found that the elevator alarm had been activated. Archer was informed by residents that the elevator was stuck. He saw approximately 10 people standing around, including Otis Williams, who is also a tenant, and the appellant. Archer testified that that he heard Williams say to the appellant, "When do you think they will have the elevator fixed?" The appellant responded by turning around to Williams, pushing him, and saying "Man get out of here." During cross examination, Archer indicated that when the appellant pushed Williams, Williams did not hit the wall. Williams also testified. He indicated that he told the security guard that he knew how to fix the problem as the alarm had gone off before. However, the appellant responded by saying "Shut up. You're just a drunk" and gave Williams a little shove which Williams described as a tap on the shoulders. Williams stated that his body did not move, nor did he hit the wall when the appellant touched him. The ALJ also summarized the written statements of Evelyn Baer and Randy Jones, security guards. In her statement, Baer indicated that the appellant got into Williams' face and told him to mind his "fucking business" and that he needed to "shut up" and pushed him into the wall. Similarly, Jones stated that the appellant told Williams to mind his business and pushed him into the wall. The appellant also testified, but denied pushing or touching Williams as charged. He maintained that Williams had grabbed his arms and in response, he broke Williams' hold and pushed him away. Moreover, the appellant denied ever telling Williams to shut up.

The ALJ did not find the appellant's testimony to be credible. The ALJ stated that the appellant's testimony appeared contrived and tailored to agree in certain respects with the testimony of Williams. While the ALJ indicated that the testimony of Williams and Archer appeared to have minimized the inappropriate conduct of the appellant, he found the written statements of Baer and Jones to represent the true version of the facts with the exception of Williams' being pushed into the wall. Therefore, the ALJ found that Williams approached the appellant with a suggestion to fix the elevator to which the appellant responded by telling him to shut up, calling him a drunk, and giving him a shove. Based on his findings, the ALJ concluded that the appellant's conduct was unbecoming a public employee and the charges against him were sustained.

As to the penalty, the ALJ reviewed the disciplinary history of the appellant which included a one-day suspension for falsification and a three-day suspension for insubordination and conduct unbecoming a public employee: making terroristic threats and displaying threatening behavior. It is noted that appellant began his employment with the Atlantic City Housing Authority in September 1998. The ALJ also correctly noted that the appellant's unsatisfactory progress reports during his working test period are not discipline. Moreover, the ALJ cited a New Jersey Superior Court, Appellate Division, decision, *Edward O'Lone v. Merit System Board,* Docket No. A-2024-95T1 (App. Div. March 31, 1997).[2] In that matter, the appellant had been employed with Ancora Psychiatric Hospital for 22 years and had only one

[2] *O'Lone* was incorrectly cited by the ALJ.

prior disciplinary charge on his record, which was deemed by the ALJ as not relevant. O'Lone had been removed on charges of physically abusing a co-employee; threatening and intimidating a co-employee on State property; and conduct unbecoming a public employee. It was asserted that O'Lone had grabbed a co-employee's throat and pushed him from a hallway into an office. The ALJ and the Board found that the charges were sustained and upheld O'Lone's removal. The Appellate Division affirmed the Board's decision in upholding the charges, but remanded the matter to the Board to consider the penalty of removal as the ALJ's findings of fact and conclusions of law, which the Board adopted, did not set forth adequate reasons for the penalty. On remand, the Board concluded that the appellant's removal had been too harsh and reduced the penalty to a six-month suspension. Upon further review, the Appellate Division indicated that the penalty imposed exceeded what was just given O'Lone's unblemished 22 year record, the support of his supervisors, the antipathy between him and the victim of the assault, and the fact that the victim was not injured. Therefore, the Appellate Division further reduced the penalty to three months. *See Edward O'Lone v. Merit System Board,* Docket No. A-2024-95T1 (App. Div. December 19, 1997).[3]

Based on the appellant's prior disciplinary record, and using *O'Lone* as guidance, the ALJ in this matter found that the appellant's discipline should be modified to a six-month suspension. The ALJ indicated that although the appellant had a shorter length of service than O'Lone, his conduct involved a level of violence much less than that of O'Lone's. Therefore, the ALJ found that a six-month suspension was a more appropriate penalty.

Initially, with regard to the charges, the Board agrees with the ALJ's conclusion that the charges have been sustained. The ALJ found that the appellant did not provide credible testimony. In this regard, the Board acknowledges that the ALJ, who has the benefit of hearing and seeing the witnesses, is generally in a better position to determine the credibility and veracity of the witnesses. *See Matter of J.W.D.*, 149 *N.J.* 108 (1997). "[T]rial courts' credibility findings . . . are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." *See In re Taylor*, 158 *N.J.* 644 (1999) (quoting *State v. Locurto*, 157 *N.J.* 463, 474 (1999)). Additionally, such credibility findings need not be explicitly enunciated if the record as a whole makes the findings clear. *Id.* at 659 (citing *Locurto, supra*). The Board appropriately gives due deference to such determinations. However, in its *de novo* review of the record, the Board has the authority to reverse or modify an ALJ's decision if it is not supported by the credible evidence or was otherwise arbitrary. *See N.J.S.A.* 52:14B-10(c); *Cavalieri v. Public Employees Retirement System*, 368 *N.J. Super.* 527 (App. Div. 2004). Nevertheless,

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[3] It is noted that the matter of O'Lone's back pay entitlement was reviewed by the Appellate Division in a subsequent decision. *See O'Lone v. Department of Human Services*, 357 *N.J. Super.* 170 (App. Div. 2003).

upon review, the ALJ's determinations in this respect are proper. Therefore, the Board upholds the charges against the appellant.

The Board, however, disagrees that the appellant's conduct only warrants a six-month suspension. In determining the proper penalty, the Board's review is *de novo*. In addition to considering the seriousness of the underlying incident in determining the proper penalty, the Board utilizes, when appropriate, the concept of progressive discipline. *West New York v. Bock*, 38 *N.J.* 500 (1962). Although the Board applies the concept of progressive discipline in determining the level and propriety of penalties, an individual's prior disciplinary history may be outweighed if the infraction at issue is of a serious nature. *Henry v. Rahway State Prison*, 81 *N.J.* 571, 580 (1980).

In the instant matter, the appellant's prior disciplinary record does not mitigate his offense, as his record in only five years of service reflects disciplinary infractions, which includes a similar infraction of unbecoming conduct. Additionally, the appellant's conduct was egregious and differs from the offense committed by O'Lone. The appellant acted in a rude manner to a resident of a building owned by his employer, used profanity, and shoved the resident. The appellant has a responsibility of maintaining a level of decorum befitting his position as a public servant. The appellant's action toward the resident disgraces this position. The Board will not tolerate the appellant's conduct. Therefore, given his prior disciplinary record, his short length of service, and the egregiousness of his conduct, the appellant's removal is appropriate.

Regarding the removal date, the FNDA indicates that the appellant was removed effective December 19, 2003. However, since the appellant was suspended without pay on November 1, 2003, the proper removal date is November 1, 2003.

ORDER

The Board finds that the action of the appointing authority in removing the appellant was justified. Therefore, the Board affirms that action and dismisses the appeal of Kambui Hannibal.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.